QUESTION PRESENTED

Whether a judicially unreviewed determination of a state administrative agency precludes an action in federal court under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1895

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

v.

ANGELO J. SOLIMINO,
Respondent.

On Writ of Certiorari from the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-three million persons age fifty and older. Approximately eleven million AARP members are employed, most of whom are protected by the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*

AARP represents the interests of older persons through legislative, judicial and administrative advocacy. The Worker Equity Initiative of AARP was created in 1985 to study and address issues affecting the employment of older workers, particularly age discrimination. Proper and full enforcement of the federal and state age dis-

crimination laws is of paramount importance to AARP and its members. To this end, AARP has been a strong advocate of legislation to strengthen the protections and procedures of the ADEA and state laws. In addition, AARP has filed numerous *amicus curiae* briefs in this Court and the United States Courts of Appeals concerning the interpretation of the ADEA to insure that the law safeguards the interests of older workers.[1]

The most significant right and remedy Congress provided older workers in the ADEA is the right to their day in court, particularly before a jury of their peers. Whether Congress intended to close the courthouse door to older workers who first seek relief through a state administrative agency, is an issue of significant concern to AARP members and other older persons who have been victims of age discrimination. For this reason, AARP respectfully submits this brief *amicus curiae*.[2]

STATEMENT OF THE CASE

AARP adopts the statement of Respondent, Angelo Solimino.

SUMMARY OF ARGUMENT

The question before this Court is who shall be the final judge in an ADEA case—a state administrative agency or a federal court. A court should craft a common law rule of preclusion that gives a state agency the last word

[1] *See, e.g., Gregory v. Ashcroft*, No. 90-50, *cert. granted*, 111 S. Ct. 507 (1990); *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18, *cert. granted*, 111 S. Ct. 41 (1990); *Hoffman-LaRoche, Inc. v. Sperling*, 110 S. Ct. 482 (1989); *Public Employees Retirement System v. Betts*, 109 S. Ct. 2854 (1989); *Harbison-Walker Refractories v. Brieck, cert. dismissed*, 487 U.S. 1216 (1988). AARP also filed a brief *amicus curiae* in this case before the Second Circuit. *Solimino v. Astoria Federal Savings and Loan Association*, 901 F.2d 1148 (2d Cir. 1990).

[2] The written consents of the parties to AARP's participation as *amicus curiae* have been filed with the Clerk of the Court.

in an ADEA case only if such a rule is consistent with congressional intent. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). This Court need only look to the language and legislative history of the ADEA to discern that Congress intended for the courts, not administrative agencies, to make the ultimate determination of age discrimination.

The plain language of the ADEA evidences Congress' intent to preserve the individual's right to a *de novo* court proceeding following a state administrative determination. Section 14(b) of the ADEA permits aggrieved persons to bring a civil action in court to adjudicate their claims either during or after the state administrative process. Congress specified that the civil action under the ADEA would be a jury trial. Surely, Congress would not have authorized the right to a jury trial after state proceedings had terminated if it viewed the state administrative determination as precluding a federal court action.

The language of section 14(a) of the ADEA also reflects Congress' intent that a federal court action takes precedence over state proceedings. In section 14(a), Congress mandated that the filing of a civil action under the ADEA "shall supersede any State action in Section 14(a)." 29 U.S.C. § 633(a). At a minimum, the plain meaning of "supersede" is that the court action under the ADEA ultimately sets aside or takes the place of the state action. Applying a rule of preclusion would turn section 14(a) on its head, as the state administrative proceedings would, in essence, replace the ADEA civil action.

Allowing the decisions of various state agencies to preclude federal court actions under the ADEA would lead to uneven and scattered enforcement of the federal law. It is well established that determinations by the federal enforcement agency, the Equal Employment Opportunity Commission (EEOC), do not preclude a *de novo* proceeding in court. Thus, individuals who proceed through the

EEOC retain their right to a jury trial regardless of an adverse determination by the federal agency.

If the Court creates a rule of administrative preclusion for ADEA cases, individuals who receive an adverse determination by a state agency would lose their day in court, even when they only sought to pursue their rights and claims under federal law. The right to a *de novo* proceeding in federal court would depend on which agency, federal or state, investigated the charge. The result would also differ between state agencies as a number of state laws provide for a *de novo* court proceeding, yet others do not. Such a result conflicts with Congress' vision of a national policy to eliminate age discrimination from society and to have that policy uniformly enforced through the courts.

Congress encouraged prompt administrative resolution of claims to benefit older workers, not to prevent older workers from seeking relief in the courts. Allowing state agency determinations to deprive older workers of the right to have a court hear and decide their claims conflicts with Congress' decision to give the courts the last word in remedying age discrimination.

ARGUMENT

THE ADEA MANDATES THAT THE COURTS, NOT ADMINISTRATIVE AGENCIES, ULTIMATELY DETERMINE THE FEDERAL RIGHTS THAT CONGRESS GUARANTEED OLDER WORKERS.

INTRODUCTION

The Second Circuit below held that it is inappropriate for the federal courts to fashion a common law rule that gives preclusive effect to determinations of state administrative agencies in an ADEA action in federal court, relying on *University of Tennessee v. Elliott*, 478 U.S. 788, 795-796 (1986). In *Elliott*, this Court held that a

common law rule of preclusion is inconsistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. In reaching this conclusion, the Court examined the language and legislative history of Title VII and relied on precedent that federal employees have a right to *de novo* court proceedings. *Elliott*, 478 U.S. at 795.

In *Elliott*, the Court focused on section 706(b) of Title VII, which outlines in part the relationship between state administrative agencies and the federal enforcement agency, the Equal Employment Opportunity Commission (EEOC). The Court held that since the language of section 706(b) requires the EEOC to give "substantial weight" to the determinations of state agencies, it would be inconsistent with the statute to accord preclusive effect in federal court to such findings.

In ruling against administrative preclusion, the Court also relied on its decision in *Chandler v. Roudebush*, 425 U.S. 480 (1976). *Chandler* held that a federal employee was entitled to *de novo* review in federal court on her Title VII claims even after an administrative hearing. While no specific language in the federal employee provision of Title VII, § 717, 42 U.S.C. § 2000e-16, spoke to the weight of administrative determinations, the Court found that the overall language of the statute coupled with the legislative history, "confirm[ed] that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees. . . ." *Elliott*, 478 U.S. at 795, quoting *Chandler*, 425 U.S. at 848.

Applying the Court's analysis in *Elliott* to the ADEA compels the same result—a state administrative determination does not preclude a *de novo* action in court. Sections 14(a) and (b) of the ADEA manifest Congress' intent to make the courts the ultimate adjudicators and enforcers of rights under the federal law. Congress made the ADEA civil action supersede any state action and granted individuals the right to a *de novo*

hearing in federal court following the termination of state proceedings. The decision of the Second Circuit in this case, along with decisions of the Fourth and Seventh Circuits,[3] properly conclude that the language, structure, and legislative history of the ADEA make the ruling in *Elliott* applicable to ADEA cases.

A. The Purpose of State Agency Review Is to Supplement, Not Supplant, the Judicial Remedies Available to Victims of Discrimination.

1. *Section 14(b) of the ADEA Provides for an Action in Federal Court Following the Termination of State Proceedings.*

The language of ADEA section 14(b) demonstrates that administrative preclusion is not consistent with congressional intent in designing the ADEA. ADEA section 14(b) provides that no suit may be brought under section 7 of the ADEA until "sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ." 29 U.S.C. § 633(b).[4]

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[3] *Duggan v. Board of Education*, 818 F.2d 1291 (7th Cir. 1987); *Rosenfeld v. Department of the Army*, 769 F.2d 237 (4th Cir. 1985). *See also Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 646 (11th Cir. 1987) (*dicta* that unreviewed state agency findings should not be given preclusive effect).

[4] As this Court has recognized, Congress patterned ADEA section 14(b), the provision for referring charges to the states, after Title VII section 706(c), 42 U.S.C. § 2000e-5(c). *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979). In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 469 (1982), the Court viewed Title VII section 706(c), along with the substantial weight provision in Title VII section 706(b), as indicative of congressional intent to preserve a trial *de novo* following the determinations of federal or state agencies. The ADEA should be similarly construed given the parallel language and purpose between ADEA section 14(b) and Title VII section 706(c). *Oscar Mayer*, 441 U.S. at 756.

The statutory language plainly authorizes the filing of a civil action after the termination of state proceedings. By expressly permitting a civil action to be brought after state proceedings have concluded, Congress made clear its intent to preserve the right to bring suit granted by ADEA section 7 following a final state action. A common law rule of administrative preclusion would make the language in section 14(b) meaningless, since such a rule would preclude the civil action itself.[5]

Moreover, Congress expressly provided that the civil action guaranteed by section 7 is a jury trial in a court of competent jurisdiction. 29 U.S.C. § 626(c)(1), (2). This reference to section 7 makes clear that Congress intended to secure a *de novo* hearing after the state agency had concluded its proceedings.[6]

Congress used language similar to section 14(b) in another provision of the ADEA to demonstrate that the determination of the state agency is not binding on the courts or the EEOC. Section 7(d)(2) expressly provides for subsequent federal action by the EEOC following the termination of state proceedings. Congress authorized EEOC to seek elimination of the discriminatory practice even after the state had rendered its de-

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[5] Petitioner and its *amici* argue that this language in section 14(b) means the employee must be bound by the agency determination even if it occurs before the employee is first permitted to withdraw from the administrative process and file an action in court. The harshness of such a result demonstrates that petitioner's construction is wholly inconsistent with the statutory scheme.

[6] Even the business community acknowledged the fairness of *de novo* review as essential to a discrimination statute. As the representative of the Chamber of Commerce testified at the hearings on the ADEA:

> A hearing *de novo* in court is the fairer approach. Each man feels he would like to have his day in court.

Hearings Before the Senate Committee on Labor and Public Welfare, Subcomm. on Labor on S. 830 and S. 788, 90th Cong., 1st Sess. 113 (1967).

cision. This provision would be totally meaningless if the state agency's determination had preclusive effect. By specifically authorizing EEOC to remedy the discrimination regardless of the state agency's action, Congress decided that the state agency would not have the last word in determining the employee's claim or his rights.

2. *Neither the State Administrative Proceedings, nor the Federal EEOC Process Substitutes for a Full Judicial Determination.*

Allowing a state agency determination to preclude a federal court action not only conflicts with the language of section 14(b), it contravenes the purposes underlying section 14(b). When Congress enacted the ADEA, it crafted a delicate scheme in which the states' efforts would supplement, not replace, federal enforcement and federal remedies. *See Oscar Mayer*, 441 U.S. at 764-65. Given the ineffectiveness of the state laws and agencies at the time the ADEA was passed, Congress provided "formal remedial procedures to compel compliance with the law . . . through suits, either by the Secretary of Labor or the aggrieved individual, in the Federal or State courts." 113 Cong. Rec. 31254 (Remarks of Sen. Javits).

The legislative history of section 14 of the ADEA makes clear that Congress sought to create a "clear-cut and implemented Federal policy * * * [that] would provide a foundation for a much-needed vigorous, nationwide campaign to promote hiring without discrimination on the basis of age." S. Rep. No. 723, 90th Cong., 1st Sess. 2 (1967).

Congress carefully structured the relationship between federal and state enforcement of age discrimination claims in the ADEA in light of various problems with civil rights enforcement at the time the ADEA was enacted. A "national policy to stop invidious distinctions in employment because of age," 113 Cong. Rec. 31253

(1967) (Remarks of Sen. Yarborough), was needed, in part, because of the lack of uniformity[7] and the ineffectiveness[8] of the twenty-four state laws prohibiting age discrimination that existed at that time.[9] Indeed, even officials in states with age discrimination laws favored federal legislation that would establish a national policy. S. Rep. No. 723, 90th Cong., 1st Sess. 3 (1967).

Given the inadequacy of the state laws, Congress required a state to not only have a law prohibiting age discrimination like the ADEA in order to participate in ADEA enforcement, but to establish a "State authority to grant or seek relief from such discriminatory practice . . ." 29 U.S.C. § 633(b).[10] In making such a re-

[7] "Although age discrimination in employment laws are found in about one-half of our States, such laws generally are not considered to be very effective." 113 Cong. Rec. 34743 (1967) (Remarks of Rep. Matsunza). There were exceptions, but "the principal reason was the lack of uniformity." *Id.*

[8] "[M]any of the [state] laws have not been implemented and most of the states lack the resources to assure compliance." 113 Cong. Rec. 34752 (1967) (Remarks of Rep. Dwyer).

[9] *See The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, p. 10, *reprinted in* Legislative History of the Age Discrimination in Employment Act of 1967, U.S. Equal Employment Opportunity Commission, p. 27 (hereinafter "Leg. Hist.").

[10] Forty-six states plus the District of Columbia currently have laws prohibiting age discrimination against private and public employees. *See* Alaska Stat. § 18.80.220(a)(1); Cal. Gov't Code § 12941(a); Colo. Rev. Stat. § 8-2-116; Conn. Gen. Stat. § 46a-60(a)(1); Del. Code Ann. tit. 19, § 710(7); D.C. Code Ann. § 1-2502(2); Fla. Stat. § 760-01-10, 112.043-44; Ga. Code Ann. §§ 34-1-2(a), 45-19-20 to 42; Haw. Rev. Stat. § 378-2; Idaho Code § 67-5910(7); Ill. Rev. Stat. ch. 68, para. 1-103(A); Ind. Code § 22-9-2-1; Iowa Code § 601A.6(1)(2); Kan. Stat. Ann. § 44-1115; Ky. Rev. Stat. Ann. § 344.010(4); La. Rev. Stat. Ann. § 972; Me. Rev. Stat. Ann. tit. 5, § 4572; Md. Code Ann. art. 49B, § 16(a); Mass. Gen. Laws Ann. ch. 151B, § 1(8); Mich. Stat. Ann. § 3.548(202); Minn. Stat. §§ 181.81, 363.03(1), (2); Mo. Rev. Stat. 213.055(1);

quirement, Congress established minimum rights, protections, and procedures in the ADEA. While the states may provide greater rights and protections, they may not diminish the protections afforded under the federal law.

Section 14(b) grants a state agency an opportunity to promptly resolve the employment dispute. As this Court has recognized, the purpose of referring charges to the states for at least sixty days was "to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Oscar Mayer & Co. v. Evans*, 441 U.S. at 756.

The state agency's role in enforcement of the ADEA parallels the role of the federal agency, the EEOC, to promptly conciliate and resolve charges of discrimination. When EEOC refers charges to the state agencies for investigation and resolution, the state administrative process substitutes for the federal administrative process. Indeed, EEOC's regulations defining the processing and investigation of charges make the state agencies the agents or proxies of the EEOC. *See* 29 C.F.R. § 1626.10 (c) (1990). State agencies are authorized to "act on certain charges and the Commission will promptly process charges which the State agency does not pursue." 29

Mont. Code Ann. § 49-2-303(1); Neb. Rev. Stat. § 48-1003(1); Nev. Rev. Stat. 613.330(a); N.H. Rev. Stat. Ann. § 354-A:8(I); N.J. Rev. Stat. § 10:5-2.1; N.M. Stat. Ann. § 28-1-7(A); N.Y. Exec. Law § 296(3-a)(a); N.C. Gen. Stat. §§ 126-16, 143-416.2; N.D. Cent. Code § 14-02.4-02(1); Ohio Rev. Code Ann. § 4112.02; Okla. Stat. Ann. tit. 25, § 1302.(1); Or. Rev. Stat. § 659.030(1)(a), (b); 43 Pa. Cons. Stat. § 954(h); R.I. Gen. Laws 28-5-6(J); S.C. Code Ann. § 1-13-30(c); Tenn. Code Ann. § 4-21-101; Tex. Rev. Civ. Stat. Ann. art. 5221k, § 1.04(a); Utah Code Ann. § 34-35-6(1)(a); Vt. Stat. Ann. tit. 21, § 495(c); Va. Code Ann. § 2.1-116.10; Wash. Rev. Code § 49.44.090(1); W. Va. Code § 5-11-3(q); Wis. Stat. Ann. § 111.33 (1); Wyo. Stat. § 27-9-105(b). Three states only cover public employees in their state laws. *See* Ark. Stat. Ann. § 12-3502; Miss. Code Ann. § 25-9-149; S.D. Codified Laws Ann. § 3-6A-36.1. Alabama has no age discrimination in employment law.

C.F.R. § 1626.10(c) (1990). A charge received by the state agency is deemed to have been received by the EEOC, and *vice versa*. *Id.*

It is well-established that the civil action following an EEOC investigation and determination is *de novo*. *See, e.g., Elliott*, 478 U.S at 795; *Kremer*, 456 U.S. at 469-70. Where the state agency acts as EEOC's agent for the processing of charges, the determination of the state agency should have no greater effect than the EEOC's determination would have on a court action. Moreover, given Congress' dissatisfaction with the ineffectiveness of state agencies at the time the ADEA was passed, it would be anomalous to accord greater power and preclusive effect to the determinations of state agencies.[11]

The state administrative process does not substitute for a *de novo* court action. The Court emphasized this aspect of section 14(b) in *Oscar Mayer*, reasoning that:

> Prior resort to the state remedy would not impair the availability of the federal remedy, for the two are supplementary, not mutually exclusive.

Oscar Mayer & Co. v. Evans, 441 U.S. at 764. Moreover, EEOC regulations emphasize that the referral and processing of charges by state agencies must "safeguard [ ] the federal rights of aggrieved persons." 29 C.F.R. § 1626.10(a) (1990). Since the state agency action is intended to supplement, not replace, the remedy provided by a federal court, permitting the state administrative decision to preclude a court action is not consistent with the scheme carefully crafted by Congress.

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[11] The ineffectiveness of the state agencies continues to be a concern even twenty years after passage of the ADEA. Attorneys representing businesses express great dissatisfaction with the ineffectiveness of state agencies. *See* M. Schuster, The Age Discrimination in Employment Act: An Evaluation of Federal and State Enforcement, Legal Processes and Employer Compliance 29 (School of Management Syracuse University 1989).

Applying a common law rule of preclusion to ADEA cases would make federal rights and remedies depend on the state law and agency where the employee worked and brought suit. Such a result would mean uneven and haphazard enforcement of the ADEA and would deny individuals in certain states their full rights under the ADEA.

Frequently, as in this case,[12] an individual files his charge only with the EEOC and seeks to exercise his rights only under the federal law. Even when the individual does not raise a state law claim, EEOC may refer the ADEA charge to the state agency to satisfy section 14(b) and thereby protect the individual's right to sue under the ADEA. EEOC may also have the state agency investigate and conciliate the charge on behalf of EEOC, pursuant to its worksharing agreement with the state agency. 29 C.F.R. § 1626.10(b) (1990).

The individual who files a charge with the EEOC does not control whether the state agency or the EEOC will investigate his charge. Yet petitioner's theory defines the employee's rights based on which agency, the state or federal, decides the claim. For example, petitioner argues that since under New York age discrimination law, the state court would give preclusive effect to the state agency's determination of a state law claim, the federal court should give similar effect to the state agency determination in a suit brought under the federal law.

Petitioner's theory not only denies the employee his federal rights, it leads to inconsistent results among the state laws. For instance, a number of state age discrimination laws provide for jury trials or *de novo* court

[12] Respondent filed a charge of discrimination with the EEOC only. EEOC referred the charge to the New York Department of Human Rights not only to protect Respondent's federal rights, but also for investigation and conciliation. Petitioner's Brief at 4.

proceedings,[13] which would mean the state agency determinations in those states have no preclusive effect. Obviously in states without age discrimination laws or enforcement authorities,[14] employees would be entitled to a jury trial under the ADEA, since the federal agency determination has no preclusive effect. *See Duggan*, 818 F.2d at 1295, n. 10.

The extent of the federal right and remedy under the ADEA clearly cannot depend on the procedures of the state age discrimination laws. *See, e.g., Oscar Mayer & Co.*, 441 U.S. at 763. To the contrary, Congress sought to safeguard the federal rights and remedies under the ADEA by insuring that the state laws and procedures not impair the federal right. *Id.*

Petitioner's construction of the ADEA not only minimizes the federal rights and remedies, it disregards Congress' intent to provide both an administrative and a judicial forum to victims of discrimination. Petitioner argues that individuals should be bound by the state agency determination unless they abandon the state process before a hearing and decision. Petitioner's theory compels the employee to choose between administrative resolution by the state agency and a jury trial in federal court. This argument makes administrative relief and judicial relief mutually exclusive, a premise at odds with the statutory scheme designed by Congress. Congress expressly granted employees an administrative forum and a judicial forum for redress of their rights under the ADEA. *See* 29 U.S.C. §§ 626(c), (d). Yet petitioner's

[13] *See*, Idaho Code § 67-5908 (right to a jury trial); N.J. Stat. Ann. § 10-5-13 (right to a jury trial); N.M. Stat. Ann. §§ 28-1-13(A) and (C) rights to a *de novo* review in court and to a jury trial).

[14] *See Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 647 n. 9 (11th Cir. 1987) (Georgia not a referral state since it "has not established a state authority "to grant or seek relief from such discriminatory practice.")

theory eliminates the possibility of prompt and informal conciliation without litigation, which is one of the essential responsibilities of the EEOC and the state agencies.

The individual who files a charge is unlikely to understand the purpose or effect or the worksharing arrangement between EEOC and the state agency. The victim of discrimination merely seeks an investigation of his claim and an attempt at informal conciliation or administrative resolution. The individual is typically not represented by counsel when he initiates or proceeds through the administrative process. No notice is given to him of the consequences of exercising his right to administrative relief.[15] Yet, the petitioner would impose a requirement that the individual must quickly withdraw from the administrative system or risk losing his day in court. Such a result is particularly inappropriate "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Oscar Mayer*, 441 U.S. at 761 quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

B. A Common Law Rule of Preclusion Is Inconsistent With ADEA Section 14(a), Which Provides That ADEA Actions "Supersede Any State Action."

The relationship between federal and state enforcement in the ADEA is defined by section 14(a) of the ADEA, as well as by section 14(b). Section 14(a) provides:

> Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age *except that upon commencement of action under this Act such action shall supersede any State action.*

29 U.S.C. § 633(a) (emphasis added).

[15] *See* J.A. 89-90, 92-93.

While state actions are not preempted under the ADEA,[16] the supersede language of section 14(a) makes the federal action take precedence over "any State action." The plain meaning of the supersede clause is that the federal action causes the state action to be set aside.[17] The phrase "any State action" clearly includes administrative actions, as section 14(a) specifically mentions "the jurisdiction of any agency." 29 U.S.C. § 633(a).[18] Congress did not qualify the phrase "any State action" as limited to pending or completed actions, and the phrase can reasonably be interpreted to encompass either pending or completed actions.[19]

Administrative preclusion would not only be inconsistent with the language of ADEA section 14(a), it would stand the language on its head. Giving preclusive effect to a state agency determination would, in essence, make

[16] *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 11 (Leg. Hist. 84); S. Rep. No. 723, 90th Cong., 1st Sess. 11 (Leg. Hist. 115).

[17] The plain meaning of "supersede" is to "cause to be set aside or dropped from use as inferior or obsolete and replaced by something else; to take the place of in function; to replace." Webster's New World Dictionary, Third College Edison (1988), 1344.

[18] *See, e.g., Dunlop v. Pan American World Airways Inc.*, 672 F.2d 1044 (2d Cir. 1982).

[19] Petitioner contends that the phrase only applies to pending actions and relies on a reference in the committee reports, which states that commencement of an action under the Act shall stay any state action previously commenced. H.R. Rep. No. 805, at 11; S. Rep. No. 723 at 11. Neither the language of the statute nor the legislative history state that section 14(a) shall have *only* that effect. Congress could have used language which would have limited the reach of section 14(a) to pending actions were that its sole purpose. Instead, Congress used far broader language.

For example, Congress used the word "supersede" seven years later in section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a), when it wanted to indicate an intent to broadly prevent state laws from interfering with the operation of the federal pension law. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

the state administrative process replace or substitute for federal court adjudication. The findings of fact of the state agency official would replace those of a federal court, a result at odds with the plain meaning of the supersede clause in section 14(a).

The legislative history of section 14(a) also supports a construction of the statute in which the ADEA civil action takes precedence over state action. As initially proposed by the Johnson Administration, the ADEA was to be enforced by administrative proceedings brought by the Secretary of Labor, similar to the enforcement machinery of the National Labor Relations Act.[20] Section 14 of the Administration bill only contained what is now the first clause in section 14(a) and did not include the supersede clause or what is now section 14(b). With enforcement limited to action by a federal agency, there was no need to explicitly prohibit state actions from displacing the Secretary's authority to enforce the Act, as federal actions took priority under the Constitution's Supremacy Clause. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978); *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). *See generally Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 369 (1986).

The initial proposal for exclusive enforcement by the Secretary was changed by an amendment providing that the Act be enforced through civil actions brought by aggrieved persons or the Secretary of Labor.[21] The congressional committees adopted the amendments and changed the enforcement machinery from primarily administrative hearings to an administrative process plus civil actions in court. At the same time, the committees

[20] S. 830, as introduced, 90th Cong., 1st Sess. 14, reprinted in 113 Cong. Rec. 2794-95 (1967) (Leg. Hist. 69).

[21] Proposed Amendments 123-129 to S. 830, reprinted in 113 Cong. Rec. 7076 (1967) (Leg. Hist. 71-73).

changed section 14 to section 14(a), added the supersede clause, and also added a new section 14(b).[22]

By eliminating the federal government as the exclusive enforcer of the ADEA, Congress removed the protective cloak of the Supremacy Clause. However, by adding the supersede clause, the same result was achieved. This legislative sequence raises the inference that at least one purpose in providing that ADEA civil actions supersede state action was to insure the same protection against state interference previously provided by the Supremacy Clause. *Cf. Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 725 n. 6 (1980). Thus, by explicitly providing that an ADEA action in federal court supersedes any state action, Congress indicated its intent that determinations by state agencies would have no preclusive effect in ADEA cases.

C. The Absence of a "Substantial Weight" Provision Does Not Compel Administrative Preclusion.

Nothing in this Court's decisions compels the conclusion that express statutory language, such as the "substantial weight" provision in Title VII,[23] is required for finding that administrative preclusion is inconsistent with the ADEA. To the contrary, the Court's decisions in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) and *Chandler v. Roudebush*, 425 U.S. 840 (1976), acknowledge the right to a *de novo* court proceeding even in the absence of an explicit statutory mandate. More-

[22] S. 830, § 14(a), S. Rep. No. 723, 90th Cong., 1st Sess. (Leg. Hist. 136); H.R. 13054, § 14(a), H.R. Rep. No. 805, 90th Cong., 1st Sess. (Leg. Hist. 103).

[23] The circuit courts finding that administrative preclusion is required in ADEA cases erroneously interpret *Elliott* as mandating explicit statutory language prohibiting preclusion or specifying the weight to be accorded state administrative determinations. *See Stillians v. Iowa*, 843 F.2d 276, 281 (8th Cir. 1988) ("We believe that the absence of a similar provision from the ADEA goes far toward resolving the issue before us."); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) (without analysis).

over, the Court's conclusions in *Kremer* and *Chandler* rest on analyses of Title VII provisions and legislative history that parallel the ADEA, which make them even more relevant to the Court's consideration of this case.

In *Kremer*, the Court recognized that prior to the addition of the "substantial weight" language in Title VII § 706(b), "EEOC was free to ignore state administrative decisions." *Id.* The *Kremer* holding implies that even absent a "substantial weight" provision, state agency determinations do not preclude federal action. *Kremer*, 456 U.S. at 474-75 n. 16.

Since the purpose of adding the "substantial weight" language to Title VII was to increase the deference accorded state findings, *Kremer*, 456 U.S. at 474-75 and n. 16, it would be anomalous to conclude that the absence of a "substantial weight" provision in the ADEA compels absolute deference to administrative determinations.[24] To the contrary, the language of sections 14(a) and (b) of the ADEA demonstrate Congress' intent that state proceedings would have no effect on an ADEA action.

Similarly, in *Chandler v. Roudebush*, 425 U.S. 840 (1976), the Court found a right to *de novo* federal court review despite the absence of express language in section 717 of Title VII mandating a *de novo* proceeding or a provision according "substantial weight" to the administrative determination. *Chandler* held that

> [t]he legislative history of the 1972 [Title VII] amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private-sector employees. . . .

425 U.S. at 848.

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[24] *See Martinez v. United Automobile Aerospace & Agricultural Implement Workers of America*, 772 F.2d 348, 351 (7th Cir. 1985) ("The policy of deference to state authority . . . is weaker [in the ADEA] than in Title VII. . .").

The reasoning and result of *Chandler* apply to the ADEA, as this Court has held that the federal employee provisions of the ADEA, section 15, were modeled after Title VII section 717, *Lehman v. Nakshian*, 453 U.S. 156, 167 n. 15 (1980). Senator Bentsen, the sponsor of section 15 of the ADEA, emphasized that "[t]he measures used to protect federal employees from [age discrimination] would be substantially similar to those incorporated in recently enacted amendments to Title VII." 118 Cong. Rec. 24397 (1972)." *Lehman v. Nakshian*, 453 U.S. at 167 n. 15. Moreover, the legislative history of the ADEA federal employee provision makes clear that federal employees would be entitled to the same protections as private employees. S. Rep. No. 690, 93d Cong., 2d Sess. 56 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 40-41 (1974). Given the parallelism between the ADEA and Title VII, *Chandler* also provides support for finding that administrative preclusion is inconsistent with the ADEA.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the Court affirm the judgment of the Second Circuit.

Respectfully submitted,

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